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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D. Noland, Jr., et al.,

13 Defendants.
14

No. CV-20-00047-PHX-DWL

ORDER

15 Pending before the Court is a “Rule 19 Motion to Dismiss or Compel Joinder of
16 Parties” filed by Defendants Jay Noland, Lina Noland, Thomas Sacca, and Scott Harris
17 (together, the “Individual Defendants”). (Doc. 167.) For the following reasons, the motion
18 will be denied.

19 **BACKGROUND**

20 The parties are familiar with the facts and history of this case, which are set out in
21 earlier orders. In a nutshell, this case concerns the business activities of Success By Health
22 (“SBH”), which is “an affiliate-marketing program that sells coffee products and other
23 nutraceuticals through its online platform and network of affiliates.” (Doc. 106 at 1-2.)
24 The Individual Defendants are affiliated with SBH in various capacities.

25 On January 8, 2020, the FTC initiated this action by filing a complaint. (Doc. 3.)
26 The complaint alleges, among other things, that SBH is an illegal pyramid scheme and that
27 the Individual Defendants have made false statements to SBH’s affiliates. (*Id.*)

28 That same day, the FTC moved for an *ex parte* temporary restraining order (“TRO”).

1 (Docs. 7, 8.)

2 On January 13, 2020, the Court substantially granted the FTC's motion for a TRO.
3 (Docs. 19, 38.)¹ In the TRO, the Court appointed Kimberly Friday (the "Receiver") to
4 serve as the receiver of SBH and affiliated entities. (*Id.*)

5 On January 17, 2020, the FTC filed an amended complaint. (Doc. 35.)

6 On January 24, 2020, the parties stipulated to keep the TRO in place pending a
7 ruling on the FTC's request for a preliminary injunction. (Doc. 43.) The preliminary
8 injunction hearing was rescheduled for February 12, 2020. (Doc. 52.)

9 On February 6, 2020, the Individual Defendants filed their answer to the FTC's
10 amended complaint. (Doc. 70.)

11 On February 10, 2020, the Receiver issued an initial report concluding that she
12 "does not believe that the business can be operated without violating the TRO. The
13 inaccurate marketing statements, the organization of the commission system, and the
14 movement of large amounts of cash to the insiders strongly suggests that the business is
15 structured in such a fashion that prevents Affiliates from realizing the promoted business
16 opportunities." (Doc. 82-1 at 19.)

17 On February 12, 2020, the preliminary injunction hearing took place. (Doc. 86.)
18 After the hearing, the Court took the matter under advisement. (*Id.*)

19 On February 18, 2020, the Individual Defendants filed an amended answer to the
20 FTC's amended complaint. (Doc. 93-1.)

21 On February 27, 2020, the Court issued an order granting the FTC's motion for a
22 preliminary injunction. (Doc. 106.) Among other things, this order authorized the
23 Receiver to resume selling SBH's existing inventory of products. (*Id.* at 28.)

24 On May 1, 2020, the parties filed the Rule 26(f) report. (Doc. 137.) Although the
25 Individual Defendants' counsel identified an array of motions he intended to file "within
26 the next couple of months," there was no mention of a motion to dismiss under Rule 19.

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28 ¹ The TRO was later amended. (Docs. 20, 21.) The final, unsealed version of the
TRO was filed on January 17, 2020. (Doc. 38.)

1 (*Id.* at 6-7.)

2 On May 12, 2020, the Receiver issued her second report. (Doc. 139-1.) Among
3 other things, she reported that her efforts to resume selling SBH’s existing inventory had
4 been delayed by the COVID-19 pandemic and by her discovery that SBH had been
5 operating without liability insurance, had been neglecting to collect sales tax, and had been
6 using an ingredient that is illegal in the United States. (*Id.* at 4-6.) She further reported
7 that product sales finally resumed during the week of May 11, 2020, that she had
8 “terminated the multi-level marketing program and the commission structure” that had
9 previously been in place, and that she had informed SBH’s affiliates “that they will not
10 earn commission or otherwise benefit from their purchases or purchases by individuals
11 formerly in their downline.” (*Id.* at 7-8.)

12 On July 28, 2020, the Individual Defendants filed the Rule 19 motion. (Doc. 167.)

13 On July 31, 2020, the FTC filed a response. (Doc. 175.)

14 On August 7, 2020, the Individual Defendants filed a reply. (Doc. 178.)

15 ANALYSIS

16 The Individual Defendants argue that approximately 4,500 SBH affiliates constitute
17 “required parties” under Rule 19(a) because those affiliates have two cognizable interests
18 in this action—first, an interest in obtaining commission payments for previous SBH
19 product sales, and second, an interest in earning future commissions by selling SBH
20 products—and because litigating this action in their absence may, “as a practical matter,”
21 impair their ability to protect those interests. (Doc. 167 at 3-4.) Thus, the Individual
22 Defendants argue that, under Rule 19, those affiliates must either be joined as parties or
23 this action must be dismissed. (*Id.*) The FTC responds that (1) the Individual Defendants
24 waived their ability to raise a Rule 19 objection by failing to assert it in a pre-answer
25 motion; (2) Rule 19(a) can’t be invoked to force an administrative agency to sue a particular
26 party in an enforcement action; and (3) joinder isn’t required on the merits because, *inter*
27 *alia*, there is no “right to participate in a pyramid scheme.” (Doc. 175.)

28 On the issue of waiver, the rule in the Ninth Circuit is that “failure to join *necessary*

1 parties is waived if objection is not made in defendant’s first responsive pleading; it is only
 2 the absence of an *indispensable* party which may (possibly) be raised later.” *Citibank, N.A.*
 3 *v. Oxford Properties & Finance Ltd.*, 688 F.2d 1259, 1262 n.4 (9th Cir. 1982) (emphases
 4 added). Thus, the Court must begin by assessing whether the Individual Defendants’
 5 motion is a challenge based on the failure to join “necessary” parties or a challenge based
 6 on the failure to join “indispensable” parties.

7 This assessment is complicated by the fact that, although the terms “necessary” and
 8 “indispensable” appeared in the text of Rule 19 at the time *Citibank* was decided, both
 9 terms were deleted in 2007 as part of a purely “stylistic” amendment to Rule 19. *Republic*
 10 *of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008). Pursuant to this amendment, “the
 11 word ‘required’ replaced the word ‘necessary’ in subparagraph (a)” and “the word
 12 ‘indispensable’ . . . [was] altogether deleted” from subparagraph (b). *Id.* Nevertheless,
 13 “the substance and operation of the Rule both pre- and post-2007 are unchanged.” *Id.* at
 14 856.

15 Given this backdrop, the Ninth Circuit’s pre-2007 caselaw addressing the distinction
 16 between “necessary” and “indispensable” parties remains relevant. In *EEOC v. Peabody*
 17 *W. Coal Co.*, 400 F.3d 774 (9th Cir. 2005), the court explained the “two parts of Rule 19”—
 18 that is, Rule 19(a) and Rule 19(b)—create “three successive inquiries.” *Id.* at 779. The
 19 first inquiry, which is governed by Rule 19(a), is whether the absent party should be
 20 considered “necessary” in light of the nature of its interest in the action. *Id.*² The second
 21 inquiry, also governed by Rule 19(a), is “whether it is feasible to order that the absentee be
 22 joined.” *Id.* The “three circumstances in which joinder is not feasible [are] when venue is
 23 improper, when the absentee is not subject to personal jurisdiction, and when joinder would

24 ² See generally *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d
 25 1176, 1179 (9th Cir. 2012) (explaining that, under the first inquiry, “[a] party may be
 26 necessary under Rule 19(a) in three different ways. First, a person is necessary if, in his
 27 absence, the court cannot accord complete relief among existing parties. Second, a person
 28 is necessary if he has an interest in the action and resolving the action in his absence may
 as a practical matter impair or impeder his ability to protect that interest. Third, a person
 is necessary if he has an interest in the action and resolving the action in his absence may
 leave an existing party subject to inconsistent obligations because of that interest.”)
 (citations omitted).

1 destroy subject matter jurisdiction.” *Id.* Finally, the third inquiry—which, again, is
 2 triggered only when the party is necessary and joinder is infeasible—is “whether the case
 3 can proceed without the absentee, or whether the absentee is an ‘indispensable party’ such
 4 that the action must be dismissed.” *Id.* This inquiry is governed by Rule 19(b). *Id.* at 779-
 5 80.

6 With these principles in mind, the Individual Defendants’ motion can only be
 7 characterized as a challenge based on the failure to join “necessary” parties, not a challenge
 8 based on the failure to join “indispensable” parties. The only portion of Rule 19 cited in
 9 the Individual Defendants’ motion papers is Rule 19(a). (Doc. 167 at 2; Doc. 178 at 1.)
 10 There is no mention of Rule 19(b). The Individual Defendants’ briefing also focuses solely
 11 on the first inquiry under *Peabody*, which is whether the nature of the affiliates’ interest
 12 renders them “required” or “necessary” parties under Rule 19(a). There is no discussion
 13 of the second inquiry (whether joinder would be infeasible due to venue or jurisdictional
 14 hurdles) or the third inquiry (whether, given the infeasibility of joinder, dismissal is
 15 required under Rule 19(b)). Indeed, the final sentence of the Individual Defendants’
 16 reply—“[T]he court should grant defendant’s Rule 19 motion and add non-party affiliates
 17 lest their interests be forever lost” (Doc. 178 at 4)—appears to be an implicit concession
 18 that joinder of the affiliates would be feasible.

19 Because the Individual Defendants’ motion is properly understood as a challenge
 20 based on the failure to join “necessary” parties, rather than as a challenge based on the
 21 failure to join “indispensable” parties, it is barred by *Citibank*.³ As noted, *Citibank* holds

23 ³ It should be noted that *Citibank*’s distinction between Rule 19(a) and 19(b)
 24 challenges is rooted in Rule 12. Under Rule 12(b), a “motion asserting” various
 25 enumerated defenses, including “failure to join a party under Rule 19,” “must be made
 26 before pleading if a responsive pleading is allowed.” However, Rule 12(h)(2) goes on to
 27 exempt a handful of specific defenses, including the failure “to join a person required by
 28 Rule 19(b),” from the forfeiture rules applicable to other defenses. *See also Baykeeper v.*
Union Pac. R. Co., 2009 WL 1517868, *2 (N.D. Cal. 2009) (“Rule 12(h)(2) merely
 exempts the failure to join a person required under Rule 19(b) from waiver, not necessary
 parties under Rule 19(a). Courts have clearly found that although the absence of an
 indispensable party may be raised at any time, the failure to join necessary parties may be
 waived if objections are not made in the defendant’s first responsive pleading.”) (citations
 omitted).

1 that “failure to join necessary parties is waived if objection is not made in defendant’s first
 2 responsive pleading.” 688 F.2d at 1262 n.4. Here, the Individual Defendants’ first
 3 responsive pleading was the answer they filed in February 2020. (Doc. 70.) It was not
 4 preceded by a motion to dismiss under Rule 12(b)(7), which is one manner in which Rule
 5 19 objections may be raised, and it did not raise any Rule 19 objections in its list of
 6 affirmative defenses. Nor did the amended answer that the Individual Defendants filed a
 7 few weeks later. (Doc. 93-1.) The Individual Defendants have therefore forfeited⁴ their
 8 ability to seek relief under Rule 19(a) based on the FTC’s alleged failure to join necessary
 9 parties. *See also Fed. Home Loan Mortg. Corp. v. Donel*, 2017 WL 2692403, *3 n.2 (D.
 10 Nev. 2017) (“Donel waived this Rule 12(b)(7) defense by failing to assert it in a motion
 11 before filing his answer.”); *Smith v. Levine Leichtman Capital Partners, Inc.*, 2011 WL
 12 13152867, *3 (N.D. Cal. 2011) (“[Defendants] waived their ability to bring a motion to
 13 dismiss pursuant Rule 12(b)(7) for failure to join a party under Rule 19(a) by failing to
 14 assert this ground for dismissal when they brought their prior motions to dismiss under
 15 Rule 12.”); *Church Mut. Ins. Co. v. Save-a-Buck Car Rental Co., Inc.*, 201 F.R.D. 440,
 16 440-41 (W.D. Mich. 2000) (because “Save-a-Buck’s answer to the complaint . . . contains
 17 no mention of its [Rule] 19 joinder defense,” “Save-a-Buck has waived the defense of
 18 failure to join a necessary party under Rule 19, even if it could not be deemed to have
 19 waived the defense of failure to join an indispensable party”).

20 In an effort to avoid this outcome, the Individual Defendants argue that Rule 19
 21 objections are “sufficiently important that [they] can be raised at any stage of the
 22 proceedings.” (Doc. 178 at 2.) However, the case the Individual Defendants cite in support
 23 of this principle, *McCowen v. Jamieson*, 724 F.2d 1984 (9th Cir. 1984),⁵ merely recognizes
 24 that courts possess the power to raise joinder issues *sua sponte*. Such recognition says

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 26 ⁴ Although *Citibank* characterizes this loss as a waiver, it is more properly
 27 characterized as a forfeiture. *United States v. Olano*, 507 U.S. 725, 733 (1993) (“Waiver
 is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion
 of a right, waiver is the intentional relinquishment or abandonment of a known right.”).

28 ⁵ The Individual Defendants’ reply attributes the quoted language to *Provident
 Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

1 nothing about whether parties may forfeit their ability to raise Rule 19-based joinder
2 challenges, and *Citibank* holds that they may. *See also Baykeeper*, 2009 WL 1517868 at
3 *3 (“The court . . . simply provide[d] that *courts* may raise the absence of necessary parties
4 *sua sponte* and may do so at any stage in the proceeding. The court did not consider
5 whether a *party* could raise the issue at any stage in the proceeding or whether this defense
6 could be waived, and did not address the requirements of Rule 12.”) (citation omitted).

7 Finally, the Individual Defendants also argue that the FTC “acknowledge[d],” in
8 footnote three of its response, that their motion is timely. (Doc. 178 at 2.) But in footnote
9 three, the FTC merely observed that motions seeking relief under Rule 19(b)—that is,
10 motions premised on the failure to join indispensable parties—are not subject to the same
11 forfeiture rules as motions seeking relief under Rule 19(a). As discussed above, that
12 observation is correct and does not assist Defendants here because they did not seek relief
13 under Rule 19(b).

14 Because the Individual Defendants have forfeited their ability to seek relief under
15 Rule 19(a), there is no need to address the parties’ other arguments. Resolving those
16 arguments would be particularly inappropriate here because the Individual Defendants
17 appear to be seeking an unprecedented outcome. The FTC has cited an unbroken line of
18 cases holding that Rule 19(a) can’t be invoked by a defendant in an enforcement proceeding
19 brought by an administrative agency. *See, e.g., SEC v. Laura*, 2020 WL 1434114, *4
20 (E.D.N.Y. 2020) (“Although there is no binding precedent that speaks directly to whether
21 Rule 19 can be invoked in an enforcement proceeding, there is a long and consistent line
22 of persuasive authority holding that Rule 19 generally cannot be invoked in SEC
23 enforcement proceedings and, as far as the court is aware, no court to have examined the
24 issue has concluded otherwise.”); *FTC v. Commerce Planet, Inc.*, 2010 WL 11673795, *3
25 (C.D. Cal. 2010) (“[Defendant] alleges that the FTC failed to join required parties in
26 violation of Federal Rule of Civil Procedure 19(a) . . . [by failing] to sue a variety of other
27 companies and individuals that were responsible for the Website. This defense is
28 insufficient as a matter of law because the FTC is not required to bring enforcement actions

1 against all entities involved with an allegedly unfair or deceptive practice.”). The
2 Individual Defendants, in turn, have not pointed to a single decision ordering such relief—
3 they simply note that the decisions cited by the FTC don’t conclusively foreclose their
4 position. (Doc. 178 at 2-3.) There is no need to consider breaking new ground here in
5 light of the forfeiture finding.

6 Accordingly, **IT IS ORDERED** that the Individual Defendants’ Rule 19 motion
7 (Doc. 167) is **denied**.

8 Dated this 21st day of September, 2020.

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13 Dominic W. Lanza
14 United States District Judge
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